Supreme Court, U.S.
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No. _____ 09-956 DEC 23 2009

OFFICE OF THE CLERK

In The Supreme Court of the United States

ROBERT DOYLE,

PETITIONER,

v.

AMERICAN HOME PRODUCTS CORPORATION
AND AMERICAN CYANAMID COMPANY,

RESPONDENTS

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

TODD C. BANK
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the conferral by Congress, upon this Court, of the power to exercise unfettered discretion over the granting of *certiorari* is an un-Constitutional delegation of legislative power.

2. Whether Senior Judgeships at the District Court and Court of Appeals levels complies with Articles II and III of the United States Constitution.

3. Whether the inclusion, on the panel of the United States Court of Appeals for the Second Circuit, of a Judge of the Court of International Trade, complies with Articles II and III of the United States Constitution.

4. Whether the United States Court of Appeals for the Second Circuit abused its discretion in refusing to avail itself of New York procedure to certify, to the New York Court of Appeals, a question that was decisive of the issue before the Second Circuit and that the Second Circuit acknowledged to be "a question that is not clearly answered in New York caselaw."

5. Whether the United States Court of Appeals for the Second Circuit, to the extent that it based its ruling on the "purpose" of a statute rather than its text, violated Petitioner's Fifth Amendment due-process right to know the law.

6. Whether the United States Court of Appeals for the Second Circuit correctly held that a prior action between the parties had been dismissed "for neglect to prosecute," and that the District Court action was therefore not protected by New York's six-month

savings provision, *i.e.*, Section 205(a) of the New York Civil Practice Law and Rules (CPLR), based on the finding of the Court of Appeals that the state court could have, based on the record in that case, dismissed that action for "neglect to prosecute," even though the state court had not, in fact, done so.

PARTIES TO THE PROCEEDING

Petitioner, Robert Doyle, at all relevant times herein, was a citizen of the State of New York.

Respondent, American Home Products Corporation, at all relevant times herein, was a corporation organized and existing under the laws of Delaware, and maintained its principal office in New Jersey; and was therefore a citizen of Delaware and New Jersey.

Respondent, American Cyanamid Company, at all relevant times herein, was a corporation organized and existing under the laws of Maine, and maintained its principal office in New Jersey; and was therefore a citizen of Maine and New Jersey.

There are no additional parties to the proceedings other than those listed in the caption.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES viii

CONSTITUTIONAL PROVISIONS viii

FEDERAL STATUTES viii

FEDERAL-COURT RULES x

STATE STATUTES x

STATE-COURT RULES x

CASES x

OTHER AUTHORITIES xv

PETITION FOR A WRIT OF *CERTIORARI* 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

A. Introduction 1

B. Statement of Facts, and Legal Background 2

Page

REASONS FOR GRANTING THE PETITION 4

I. THIS COURT'S *CERTIORARI* JURISDICTION IS AN UNCONSTITUTIONAL DELEGATION OF CONGRESS'S POWER OVER THE APPELLATE JURISDICTION OF THIS COURT 4

II. THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT SENIOR JUDGESHIPS AT THE DISTRICT-COURT AND COURT-OF-APPEALS LEVELS CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 9

A. The Absence of a Requirement That Senior Judges Perform Any Article III Duties Violates Article III of the Constitution 9

B. The Tenure and Salary Protections of Article III May Not Be Granted to Senior Judges . . . 10

C. The Right To Maintain One's Senior Judgeship By Performing Non-Article III Duties on Behalf of the Executive and Legislative Branches of the Federal Government Violates Separation-of-Powers Principles 10

Page

D. Senior Judgeships Violate the Article III Principle of Judicial Independence 11

(i) Because Senior Judges May Perform Judicial Duties Only By the Permission of Their Colleagues, Senior Judges Lacks the Independence Required by Article III 11

(ii) That Senior Judges May, by Means Other Than Impeachment, Be Prevented From Exercising Article III Power Violates the Impeachment Clause of the Constitution as Well as the Principle of Judicial Independence 14

E. The Office of a Senior Judge is Separate From the Office of an Active Judge, and Therefore a Senior Judge Must Be Separately Appointed to That Office 15

F. It Is Irrelevant That the President and Senate, When Appointing a Judge, Are Presumably Aware That He Might Become a Senior Judge 22

Page

III. THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT A PANEL OF A COURT OF APPEALS TO INCLUDE A JUDGE OF THE COURT OF INTERNATIONAL TRADE CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 24

IV. THIS COURT SHOULD EXPLAIN THAT THE DECISION OF WHETHER TO CERTIFY, BY A COURT OF APPEALS TO THE HIGHEST COURT OF A STATE, A STATE-LAW QUESTION DOES NOT DEPEND ON THE WORTHINESS OF THE LITIGANTS IN THE ACTION 25

V. THE ISSUE OF WHETHER A STATUTE MAY BE CONSTRUED BASED UPON ITS PURPOSE RATHER THAN UPON ITS TEXT RAISES THE CRITICAL ISSUE OF THE DUE-PROCESS RIGHT TO KNOW THE LAW 28

VI. THE ISSUE OF WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 205(a) OF THE NEW YORK CIVIL PRACTICE LAW AND RULES PRECLUDED PETITIONER'S DISTRICT COURT ACTION AFFECTS NUMEROUS LITIGANTS 30

Page

CONCLUSION 31

Appendix A — Statutory Provisions Involved ..... Pet. App. 1a

Appendix B — Opinion of the United States Court of Appeals for the Second Circuit, dated and entered September 29, 2009 ..... Pet. App. 9a

Appendix C — Order of the United States District Court for the Eastern District of New York, dated and entered March 31, 2008 ..... Pet. App. 20a

Appendix D — Order of the Supreme Court of the State of New York, County of Kings, dated March 11, 2006 ..... Pet. App. 24a

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. II 11

Art. II, § 2, cl. 2 15

U.S. Const., Art. II, § 4 14

U.S. Const., Art. III ..... *passim*

U.S. Const., Art. III, § 2, cl. 2 4

U.S. Const., Art. IV, § 1 6

U.S. Const., Art. IV, § 3, cl. 2 6

FEDERAL STATUTES

10 U.S.C. § 826 17

28 U.S.C. § 1 9

28 U.S.C. § 2 9

28 U.S.C. § 46(a) 9

28 U.S.C. § 48(a) 9

28 U.S.C. § 132(b) 9

28 U.S.C. § 293(a) 25

Page

28 U.S.C. § 294(b) 9, 15

28 U.S.C. § 294(c) 9, 11, 12, 15

28 U.S.C. § 294(d) 9, 12, 15

28 U.S.C. § 294(e) 12

28 U.S.C. § 332(a)(1) 11

28 U.S.C. § 332(a)(3) 11

28 U.S.C. § 371(b)(1) 10

28 U.S.C. § 371(e)(1) 10

28 U.S.C. § 371(e)(1)(C) 9

28 U.S.C. § 371(e)(1)(D) 9, 10, 11

28 U.S.C. § 1253 8

28 U.S.C. § 1254 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1257 8

28 U.S.C. § 1332(a)(1) 1

28 U.S.C. § 1581(i) 25

Page

FEDERAL-COURT RULES

Rules of the Second Circuit § 0.27 26

STATE STATUTES

N.Y. CPLR § 205(a) 2, 3, 26, 28, 29, 30

STATE-COURT RULES

New York Court of Appeals Rule 500.27(a) 26

CASES

American Air Parcel Forwarding Co. v. United States,
515 F. Supp. 47 (C.I.T. 1981) 24-25

American Power & Light Co. v. SEC,
329 U.S. 90 (1946) 7

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 26

Booth v. United States,
291 U.S. 339 (1934) 23, 24

Brown v. Allen,
344 U.S. 443 (1953) 5

Page

Brown v. Texas,
522 U.S. 940 (1997) 6

Chandler v. Judicial Council of the Tenth Circuit,
398 U.S. 74 (1970) 12, 13, 14

Clemons v. Mississippi,
494 U.S. 738 (1990) 21

Clinton v. City of New York,
524 U.S. 417 (1998) 6-7

Darr v. Burford,
339 U.S. 200 (1950) 6

Dickerson v. United States,
530 U.S. 428 (2000) 8-9

Doyle v. Am. Home Products Corp.,
2008 U.S. Dist. LEXIS
110122 (E.D.N.Y. 2008) 1

Doyle v. Am. Home Products Corp.,
___ F.3d ___, 2009 U.S. App. LEXIS
21316 (2d Cir. Sept. 29, 2009) ..... *passim*

Doyle v. American Home Products Corp.,
729 N.Y.S.2d 194 (N.Y. App. 2001) 27

Page

Durham v. United States,
401 U.S. 481 (1971),
overruled on other grnds,
Dove v. United States,
423 U.S. 325 (1976) 4

Edmond v. United States,
520 U.S. 651 (1997) 15, 17

Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati,
525 U.S. 943 (1998) 5-6

GM Corp. v. Devex Corp.,
461 U.S. 648 (1983) 26

Geras v. Lafayette Display Fixtures, Inc.,
742 F.2d 1037 (7th Cir. 1984) 13

Heitmuller v. Stokes,
256 U.S. 359 (1921) 5

J. W. Hampton, Jr., & Co. v. United States,
276 U. S. 394 (1928) 7, 8

Kleppe v. New Mexico,
426 U.S. 529 (1976) 6

Lehman Brothers v. Schein,
416 U.S. 386 (1974) 26

Marin v. Augedahl,
247 U.S. 142 (1918) 6

Page

Massachusetts v. EPA,
549 U.S. 497 (2007) 5

Mistretta v. United States,
488 U.S. 361 (1989) 7

Muskrat v. United States,
219 U.S. 346 (1911) 5

Myers v. United States,
272 U.S. 52 (1926) 5

NAACP v. New York,
413 U.S. 345 (1973) 26

Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.,
337 U.S. 582 (1949) 5

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 11

Philippines v. Pimentel,
128 S. Ct. 2180 (2008) 28

Post v. United States,
407 F.2d 319 (1968) 21

Salve Regina College v. Russell,
499 U.S. 225 (1991) 21

Page

Shoemaker v. United States,
147 U.S. 282 (1893) 18, 19

Shurtleff v. United States,
189 U.S. 311 (1903) 14

Skinner v. *Mid-America Pipeline Co.*,
490 U.S. 212 (1989) 7

Town of Castle Rock v. Gonzales,
545 U.S. 748 (2005) 28

United States v. Bitty,
208 U.S. 393 (1908) 5

United States v.
Chicago, M., St. P. & P. R. Co.,
282 U. S. 311 (1931) 6

United States v. Shubert,
348 U.S. 222 (1955) 5

Weiss v. United States,
510 U.S. 163 (1994) 15, 17, 18, 19, 20,
21, 22, 23, 23, n.1

Yakus v. United States,
321 U.S. 414 (1944) 7

Page

OTHER AUTHORITIES

4 *The Founders' Constitution*
(Philip B. Kurland &
Ralph Lerner, eds., 1987) 10

History of Appointments to the Supreme Court,
4B Op. Off. Legal Counsel 457 (1980) 16

Legislation Authorizing the Transfer of
Federal Judges from One District to Another,
4B Op. Off. Legal Counsel 538 (1980) 16, 17

Stras & Scott, *Are Senior*
Judges Unconstitutional?
92 Cornell L. Rev. 453 (2007) 24, n.2

Stras & Scott, *Retaining Life Tenure:*
The Case for a "Golden Parachute,"
83 Wash. U. L.Q. 1397 (2005) 10

PETITION FOR A WRIT OF *CERTIORARI*

Petitioner respectfully petitions this Court for a writ of *certiorari* to review the Judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 583 F.3d 167 (Jacobs, *C.J.*; Sack, *S.J.*; and Goldberg, *J., C.I.T.*), and is reprinted in Petitioner's Appendix (Pet. App.) at 9a-19a. The Opinion of the District Court is unreported but is available at 2008 U.S. Dist. LEXIS 110122 (E.D.N.Y. Mar. 31, 2008) (Korman, *S.J.*), and is reprinted at Pet. App. at 20a-23a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1332(a)(1). The United States Court of Appeals for the Second Circuit entered judgment on September 29, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction

This Petition concerns six issues: (1) whether Congress may delegate, to this Court, Congress's authority to regulate the appellate jurisdiction of this Court; (2) whether Articles II and III of the United

States Constitution permit Senior Judgeships at the District Court and Court of Appeals levels; (3) whether Articles II and III of the United States Constitution permit a Judge of the Court of International Trade to sit on a panel of a United States Court of Appeals; (4) whether the United States Court of Appeals for the Second Circuit abused its discretion in refusing to avail itself of New York procedure to certify, to the New York Court of Appeals, a state-law question that was decisive of the issue before the Second Circuit and that the Second Circuit acknowledged to be "a question that is not clearly answered in New York caselaw"; (5) whether the United States Court of Appeals for the Second Circuit, in basing its ruling on the "purpose" of New York's six-month savings provision, *i.e.*, Section 205(a) of the New York Civil Practice Law and Rules (CPLR), rather than its text, violated Petitioner's Fifth Amendment due-process right to know the law; and (6) whether the United States Court of Appeals for the Second Circuit correctly held that the dismissal of Petitioner's prior action, in state court, should have been treated by the District Court as a dismissal "for neglect to prosecute," such that Petitioner's District Court action was not protected by CPLR § 205(a), where the state court's order of dismissal did not state that it was issued due to the plaintiff's neglect, contained no findings of neglect, and was not issued in response to a motion seeking dismissal for neglect.

B. Statement of Facts, and Legal Background

1. Petitioner brought the underlying diversity action in the Eastern District of New York under 28 U.S.C. § 1332(a).

2. The District Court granted Respondent's motion to dismiss the complaint on statute-of-limitations grounds, based on the following finding: that a prior action between the parties, in New York state court, had been dismissed "for neglect to prosecute," and that, therefore, Petitioner was not protected by the six-month savings clause of CPLR § 205(a).

3. The Court of Appeals, in its Opinion, affirmed the ruling of the District Court.

REASONS FOR GRANTING THE PETITION

POINT I

THIS COURT'S *CERTIORARI* JURISDICTION IS AN UN-CONSTITUTIONAL DELEGATION OF CONGRESS'S POWER OVER THE APPELLATE JURISDICTION OF THIS COURT

Article III of the Constitution states that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have *appellate Jurisdiction*, both as to Law and Fact, with *such Exceptions*, and under *such Regulations*, as the *Congress* shall make." U.S. Const., Art. III, § 2, cl. 2 (emphases added).

Under the Judiciary Act of 1925, 43 Stat. 936, codified, as amended, at 28 U.S.C. § 1254, "decisions on certiorari petitions are wholly discretionary." *Durham v. United States*, 401 U.S. 481, 483, n.* (1971), *overruled on other grnds, Dove v. United States*, 423 U.S. 325 (1976). Whether such discretion constitutes an abdication of Congress's authority to make "such Exceptions, and . . . such Regulations" to the appellate jurisdiction of this Court, U.S. Const., Art. III, § 2, cl. 2, is clearly of the utmost importance, as it, first, concerns the very nature of this Court's role, and, second, raises the issue of whether this Court is to be treated differently than are Executive Branch agencies for purposes of the non-delegation doctrine, and, specifically, the issue of whether Congress may delegate, virtually wholesale, its authority to regulate this Court's appellate jurisdiction.

Article III courts are authorized to exercise "judicial power," U.S. Const., Art. III, § 2, cls. 1, 2, which is "limit[ed] . . . to the adjudication of 'Cases' and 'Controversies.'" *Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting). *See also Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (Article III courts may not "participate in any legislative, administrative, political[,] or other nonjudicial function or to render any advisory opinion."); *id.* at 592 (Article III courts "are *limited* to the exercise of *judicial power*, [which] may constitutionally be received from either Art. III or Art. I.") (emphases added); *Myers v. United States*, 272 U.S. 52, 233 (1926) ("the *disposal of the judicial power* (except in a few specified instances) belongs *to Congress*") (emphases added); *Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) "[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect."); *Muskrat v. United States*, 219 U.S. 346, 352 (1911) ("neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."); *United States v. Bitty*, 208 U.S. 393, 399-400 (1908) ("[w]hat such exceptions and regulations should be [to the appellate jurisdiction of the Supreme Court] is *for Congress*, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution.") (emphasis added).

The denial of *certiorari* is *not* an adjudication of a case or controversy. *See United States v. Shubert*, 348 U.S. 222, 229, n.10 (1955); *Brown v. Allen*, 344 U.S. 443, 489-497 (1953); *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 525 U.S. 943

(1998) (opinion of Stevens, J., respecting denial of certiorari); *Brown v. Texas*, 522 U.S. 940, 942 (1997) (same); *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting from denial of *cert.*) ("[n]othing is more basic to the functioning of this Court than an understanding that denial of *certiorari* is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner"). Thus, this Court's discretionary power over *certiorari* petitions is the power to decide *whether* to exercise judicial power; yet, under Article III, Section 2, cl. 2, the power to decide whether this Court shall exercise judicial power is a *legislative* power (and is no less so for appearing outside of Article I of the Constitution, as is the case with respect to other powers of Congress that appear outside of Article I. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529 (1976) (Property Clause, *i.e.*, U.S. Const., Art. IV, § 3, cl. 2); *Marin v. Augedahl*, 247 U.S. 142, 146 (1918) (Full Faith and Credit Clause, *i.e.*, U.S. Const., Art. IV, § 1)).

> While Congress has the authority to
>
> "see[k] assistance from another branch" of Government, . . . there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States* v. *Chicago, M., St. P.* & P. R. Co., 282 U. S. 311, 324 (1931). Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an *intelligible*

> *principle* to which the person or body authorized to [act] is directed to conform." *J. W. Hampton* [, *Jr.*, & *Co.* v. *United States*], [276 U. S. 394] at 409 [(1928)] (emphasis added).

Clinton v. City of New York, 524 U.S. 417 (1998) (Breyer, J., dissenting). Similarly, this Court, in *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989), explained:

> Earlier this Term, in *Mistretta v. United States*, 488 U.S. 361 (1989), we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "'ascertain whether the will of Congress has been obeyed,'" no delegation of legislative authority trenching on the principle of separation of powers has occurred. *Id.*, at 379, quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944). *See American Power & Light Co. v. SEC*, [329 U.S. 90] at 105 [(1946)] (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations").

Id. at 218-219.

Congress, in granting this Court uncircumscribed discretion in deciding whether to grant *certiorari* petitions, not only failed to provide any "intelligible principles" pursuant to which such discretion is to be exercised, but provided *no principles or guidelines whatsoever*. The conferral of such unchecked power is a complete abdication of Congress's authority to regulate this Court's appellate jurisdiction. Thus, apart from the sole exception to this Court's *certiorari* power, *see* 28 U.S.C. § 1253 (appeals from three-judge District Court panels), this Court could choose to never hear an appeal, or could create any guidelines or criteria whatsoever for resolving *certiorari* petitions (provided that such guidelines or criteria do not otherwise violate the Constitution, which would subject this Court to mandamus actions in the D.C. District Court; *e.g.*, a rule that this Court would refuse to hear any *certiorari* petition brought by a petitioner of a particular racial group). In short, just as Congress may not "invest itself or its members with either executive power or judicial power," *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928), separation-of-powers principles preclude Congress from investing the judiciary with legislative power, yet such investiture precisely describes this Court's *certiorari* power.

Finally, this Court's *certiorari* power cannot be upheld as part of this Court's limited administrative power over the lower federal courts, for this Court has *certiorari* power not only over federal Courts of Appeals, but also over state courts, *see* 28 U.S.C. § 1257, over which this Court has no administrative power. *See Dickerson v. United States*, 530 U.S. 428 (2000) ("[t]his Court has supervisory authority over the federal courts," *id.* at 437, but it "is beyond dispute that

we do not hold a supervisory power over the courts of the several States." *Id.* at 438.)

In sum, this Court lacks the Constitutional authority to decide when to exercise this Court's appellate jurisdiction. Therefore, this Court must grant this Petition.

POINT II

THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT SENIOR JUDGESHIPS AT THE DISTRICT-COURT AND COURT-OF-APPEALS LEVELS CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

A. The Absence of a Requirement That Senior Judges Perform Any Article III Duties Violates Article III of the Constitution

While Active Article III Judges are obligated to regularly perform Article III duties, *see* 28 U.S.C. §§ 1, 2, 46(a), 48(a), 132(b), 139, Senior Judges are *not* required to perform *any* Article III duties. *See* 28 U.S.C. § 371(e)(1)(C) and (D). Rather, only a Senior Judge who is "willing" to perform Article III duties, *see* 28 U.S.C. § 294(b) - (d), the quantity of which such Senior Judge is free to choose, *see* 28 U.S.C. § 371(e)(1), shall undertake such duties, but only to the extent, if any, that such duties are "designated and assigned" to him. 28 U.S.C. § 294(c), (d). However, Article III does not permit the creation of an Article III office that does not require the performance of any

Article III duties. *See* Stras & Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 Wash. U. L.Q. 1397, 1414-1415 (2005).

B. The Tenure and Salary Protections of Article III May Not Be Granted to Senior Judges

Because a Senior Judge is permitted to act as an Article III Judge in name while not in actuality, it is a violation of Article III to give him, as is now the case, Article III's tenure and salary protections. *See* 28 U.S.C. § 371(b)(1). As a Senior Judge is not a genuine Article III Judge but is instead a non-Article III officer, he must be removable, at will, by the President; if a Senior Judge may not be so removed, then the President's removal power could likewise be stripped with respect to any other non-Article III officers. *See* Letter from James Madison to Thomas Jefferson (June 30, 1789), reprinted in 4 *The Founders' Constitution*, at 104 (Philip B. Kurland & Ralph Lerner, eds., 1987).

C. The Right To Maintain One's Senior Judgeship By Performing Non-Article III Duties on Behalf of the Executive and Legislative Branches of the Federal Government Violates Separation-of-Powers Principles

Notwithstanding that a Senior Judge is not a genuine Article III officer, *see* Point II.B, *supra*, a Senior Judge may "retain [his Article III] office" by "perform[ing] substantial duties for a Federal or State *governmental entity*." 28 U.S.C. § 371(e)(1)(D) (emphases added). The maintenance of one's Article III

Judgeship by acting as an agent of the federal Executive or Legislative Branch plainly violates the most fundamental separation-of-powers principles, under which each of the three branches of the federal government is exclusively vested with the powers of the respective branch. Just as one could not hold an Article II office by acting as an Article I or Article III officer, one may not hold an Article III office by acting as an Article I or Article II officer. However, that is precisely what Section 371(e)(1)(D) purports to allow.

D. Senior Judgeships Violate the Article III Principle of Judicial Independence

(i) Because Senior Judges May Perform Judicial Duties Only By the Permission of Their Colleagues, Senior Judges Lacks the Independence Required by Article III

Notwithstanding this Court's recognition that "[t]he guarantee of life tenure insulates the individual judge from improper influences not only by other branches but *by colleagues* as well, and thus promotes *judicial individualism*," *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60, n.10 (1982) (emphases added), a Senior Judge, in order to perform judicial duties on a District Court or Circuit Court *within* his home circuit, must be "designated and assigned" to do so by either the Chief Circuit Judge or judicial council of that circuit, *see* 28 U.S.C. § 294(c), while the judicial council of a circuit, in turn, is composed of the Chief Circuit Judge and an equal number of Circuit and District Judges, *see* 28 U.S.C. § 332(a)(1), who themselves can be Active or Senior Judges. *See* 28 U.S.C. § 332(a)(3). In order to perform

judicial duties on a District Court or Circuit Court *outside* his home circuit, a Senior Judge must be "designated and assigned" to do so by the Chief Justice "upon the presentation [to the Chief Justice] of a certificate of necessity by the chief judge or circuit justice of the [outside] circuit." 28 U.S.C. § 294(d). In sum, "[n]o [Senior] [J]udge shall perform judicial duties except when designated and assigned." 28 U.S.C. § 294(e).

Section 371 imposes no restrictions on the criteria that a Chief Circuit Judge or Judicial Council may employ in choosing which Senior Judges, if any, to assign to which cases. *See* 28 U.S.C. § 294(c), (d). Thus, Section 371 authorizes the Chief Circuit Judge and Judicial Council to refuse to appoint a Senior Judge to perform *any* Article III duties. Because Section 371 places no limits on the discretion of a Chief Circuit Judge or Judicial Council, assignments may be based upon any criteria, whether subjective or objective. Therefore, at least with respect to Senior Judges who desire to perform Article III duties, this *carte blanche* necessarily puts, at risk, the independence of Senior Judges, whose future assignments, in terms of whether, when, how often, and to which cases they are to be assigned, may clearly be affected by their rulings or votes, or even by facets of their non-judicial life, such as their political views or their sociability with the Chief Circuit Judge or the members of the Judicial Council. As explained by Justice Douglas in his dissenting opinion in *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970):

> An independent judiciary is one of this Nation's outstanding characteristics. Once a federal judge is confirmed by the

> Senate and takes his oath, *he is independent of every other judge*. He commonly works with other federal judges who are likewise sovereign. *But neither one alone nor any number banded together can act as censor and place sanctions on him*. Under the Constitution the only leverage that can be asserted against him is impeachment . . . .

Id. at 136 (Douglas, J., dissenting) (emphases added). *See also Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) (Posner, J., dissenting):

> It is not only the citizenry that has an interest in the quality of federal justice. . . . The states have not consented to have issues of their own law determined by judges who do not have the guarantees of independence that Article III requires for federal judges. And they have not consented to have federal law interpreted and applied against them by judges who are not independent, but are the handmaidens of Congress or the President *(or, for that matter, of other judges)*.

Id. at 1052 (Posner, J., dissenting) (emphasis added).

This case presents an even sharper instance of the challenge to judicial independence than do most cases in which a Circuit panel contains a Senior Judge, because, here, the panel of the Second Circuit included Chief Judge Jacobs, who, as shown above, has

significant power over whether Senior Judge Sack will sit on Second Circuit panels. Regardless of how, or even whether, that power has been used by Chief Judge Jacobs, its very existence necessarily can do nothing but undermine the public's confidence that the vote of Senior Judge Sack to join Chief Jacobs's Opinion was based solely on the oath of office that Senior Judge Sack took.

(ii) That Senior Judges May, by Means Other Than Impeachment, Be Prevented From Exercising Article III Power Violates the Impeachment Clause of the Constitution as Well as the Principle of Judicial Independence

The authority of the Chief Circuit Judge or Judicial Council to prevent a Senior Judge from exercising Article III power violates not only the Article III principle of judicial independence, *see* Point II.D(i), *supra*, but also the Impeachment Clause of the Constitution, which provides that "all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors," Art. II, § 4, and which has been interpreted to mean that "the only leverage that can be asserted against [an Article III Judge] is impeachment." *Chandler, supra*, 398 U.S. at 136 (Douglas, J., dissenting) (as noted in *Shurtleff v. United States*, 189 U.S. 311, 316 (1903), federal judges are "civil officers" within the meaning of this clause).

E. The Office of a Senior Judge is Separate From the Office of an Active Judge, and Therefore a Senior Judge Must Be Separately Appointed to That Office

Under the Appointments Clause of the Constitution (Art. II, § 2, cl. 2), "principal . . . officers within the meaning of the [] Clause . . . must [] be appointed by the President with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 655-656 (1997). Because a Senior Judge retains the right to perform Article III duties, he is a principal officer. *See Weiss v. United States*, 510 U.S. 163, 191, 192, n.7 (1994) (Souter, J., concurring) (explaining that federal judges are principal officers). However, the differences between an Active Article III Judgeship and a Senior Judgeship render them separate offices that therefore require separate appointments (assuming, *arguendo*, that Senior Judgeships were otherwise Constitutional). First, unlike an active Article III Judge, a Senior Judge is not required to perform any Article III duties, but, rather, only those that he is "willing" to perform, *see* 28 U.S.C. § 294(b) - (d); second, even upon being so willing, he will then perform only those Article III duties to which he is "designated and assigned," *see id.*; third, a Senior Judge may act as an "itinerant" judge in that he may be "designated and assigned" to serve on any District Court within his Circuit, *see* 28 U.S.C. § 294(c), and on his Circuit's Court of Appeals, *see id.*, and on the District Courts and Courts of Appeals of any other Circuit. *See* 28 U.S.C. § 294(d).

Even a Senior Judge who serves only on the Court to which he had been appointed as an *Active*

Judge would have been appointed to serve *in that capacity* as an *independent judge* who was *obligated* to perform judicial duties, rather than to perform such duties only with the permission of his judicial peers, and only if he wishes to do, or to serve, as a Senior Judge may, in a non-judicial (*e.g.*, administrative) capacity, or even in no capacity at all while preserving the right to seek to resume Article III duties.

An itinerant Senior Judge would likewise have originally been appointed to serve on a particular court, not to serve as a free-floating judge on courts of different levels and in different circuits (again, when he is so willing and is chosen to do so by his peers). *See Legislation Authorizing the Transfer of Federal Judges from One District to Another*, 4B Op. Off. Legal Counsel 538, 540 (1980) ("a judge's commission includes the name of the district or circuit in which he is intended to serve, and his appointment and confirmation are predicated on the expectation that he will in fact be serving in that district or circuit."); *see also id.* at 541 (acknowledging that the Constitutionality of itinerant Senior Judges is not clear). In making an Article III appointment to a particular court, the President and Senate unquestionably take into account any of a variety of factors. *See History of Appointments to the Supreme Court*, 4B Op. Off. Legal Counsel 457, 461-67 (1980) (highlighting the importance of geography, political and legal philosophy, and other factors in the selection of Supreme Court Justices). Thus, by serving in a different geographic region and/or at a higher or lower level of the judicial hierarchy than that to which a Senior Judge had originally been appointed, the itinerant Senior Judge can upset every aspect of the original appointment calculus. *See Legislation*

Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. Off. Legal Counsel 538, 541 (1980) (stating that a transfer option for federal judges would "go against a tradition of regionalism in the selection of district judges that, if not constitutionally required, has about it an aura of constitutional respectability that should be disturbed only for compelling reasons").

In *Weiss v. United States*, 510 U.S. 163 (1994), this Court addressed a statute (10 U.S.C. § 826) under which the Judge Advocate General of each respective branch of the Armed Forces was authorized to assign commissioned officers to serve as military trial judges. Commissioned officers were inferior officers who were appointed by the President and Senate, *see id.* at 168, 168, n.2, *i.e.*, in the manner by which principal officers *must* be appointed but that is also "the *default manner* of appointment for *inferior* officers." *Edmond v. United States*, 520 U.S. 651, 660 (1997) (emphases added). Like commissioned officers, military trial judges were also considered to be inferior officers. *See Weiss*, 510 U.S. at 182 (Souter, J., concurring). However, Judge Advocates General did not have the authority under the Appointments Clause to appoint inferior officers. *See Weiss*, 510 U.S. at 196 (Scalia, J., concurring). Thus, in order to decide whether Judges Advocate General could be given the authority to assign commissioned officers to serve as military trial judges, the Court set out to determine whether the position of a military trial judge "is so different from other positions to which a[] [commissioned] officer may be assigned that . . . the Appointments Clause, by constitutional command, requires [a separate appointment]." *Weiss*, 510 U.S. at 170. The Court upheld the statute because it found that the positions

at issue there were not so different from each other such that they constituted separate offices requiring separate appointments. *See Weiss*, 510 U.S. at 174-176. As the Court explained:

> The present cases before us differ from *Shoemaker* [*v. United States*, 147 U.S. 282 (1893)] in several respects, at least one of which is significant for purposes of Appointments Clause analysis. In *Shoemaker*, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the Court's description of the argument as being that "while Congress may create an office, it cannot appoint the officer." By looking to whether the additional duties assigned to the offices were "germane," the Court sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office. But here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers. In short, there is no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office.

Weiss, 510 U.S. at 174. The Court continued by stating that "[e]ven if we assume, *arguendo*, that the principle of 'germaneness' applies to the present situation, we

think that principle is satisfied here." *Weiss*, 510 U.S. at 174. Justice Scalia's concurring opinion makes clear that the germaneness requirement is not limited to those situations in which Congress seeks effective control over which specific individuals will assume new duties:

> The Court states that these cases differ from *Shoemaker v. United States*, 147 U.S. 282 (1893), because, after the passage of the Military Justice Act of 1968, military judges could be selected from "hundreds or perhaps thousands of qualified commissioned officers," *ante*, at 759, so that there is no concern (as there was in *Shoemaker*, where a single incumbent held the office whose duties were enlarged) that "Congress was trying to both create an office and also select a particular individual to fill the office," *ante*, at 174. That certainly distinguishes *Shoemaker*, but I do not see why it leads to the Court's conclusion that therefore "germaneness" analysis need not be conducted here as it was in *Shoemaker* (though the Court proceeds to conduct it anyway, *ante*, at 174-176).
>
> Germaneness analysis must be conducted, it seems to me, whenever that is necessary to assure that the conferring of new duties does not violate the Appointments Clause. Violation of the Appointments Clause occurs not only when (as in *Shoemaker*) Congress may be aggrandizing itself (by effectively

> appropriating the appointment power over the officer exercising the new duties), but also when Congress, without aggrandizing itself, *effectively lodges appointment power in any person other than those whom the Constitution specifies.* Thus, "germaneness" is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause--*i.e.*, the President, the Courts of Law, and Heads of Departments.

Weiss, 510 U.S. at 195-196 (Scalia, J., concurring) (emphasis added). Absent the germaneness requirement, one who has been appointed to an office could thereafter be appointed, outside the strictures of the Appointments Clause, to a second office so long as there are a sufficient number of officers of the first type such that Congress could not be said to have attempted to have the second office occupied by any particular individuals. Thus, Congress would, for example, be able to authorize any third party (or even an officer himself, as is the case with respect to Active Judges who choose to become Senior Judges) to appoint, from a sufficiently large pool of individuals, an officer whose appointment would otherwise have to be made in accordance with the Appointments Clause. However, doing so would violate the Appointments Clause's anti-abdication principle:

> [N]o branch may abdicate its Appointments Clause duties. Congress, for example, may not authorize the appointment of a principal officer without

> Senate confirmation . . . . [FN3]
>
> ***
>
> [FN3] the ready analogy to the Appointments Clause's anti-abdication principle is what has been called "nondelegation doctrine."

Weiss, 510 U.S. at 188, 189 (Souter, J., concurring).

Finally, inasmuch as a Senior Judge may fulfill his duties by serving on a level of the federal judiciary that differs from the level on which he was appointed to serve, such option further violates the appointments clause, for the offices of District Judge and Circuit Judge are markedly distinct, such that one who is appointed to one office may not occupy the other office without being separately appointed to it. *See Clemons v. Mississippi*, 494 U.S. 738, 768 (1990) ("this Court [] has emphasized that trial and appellate tribunals respectively perform distinct functions"); *Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991) ("District Judges preside over fast-paced trials [and make factual findings based on evidence][,] [while] Courts of appeals, on the other hand, are structurally suited to the collaborative judicial process that promotes decisional accuracy . . . [and] devote their primary attention to legal issues."); *Post v. United States*, 407 F.2d 319, 323 (1968) (recognizing "the dissimilar roles trial and appellate judges play in scrutinizing evidence").

F. It Is Irrelevant That the President and Senate, When Appointing a Judge, Are Presumably Aware That He Might Become a Senior Judge

Presumably, the President and Senate, when appointing an Article III Judge, are aware that such a Judge might become a Senior Judge. However, that is irrelevant. As Justice Souter explained in *Weiss*, *supra*:

> Military officers commissioned before 1968, though they received Presidential appointment and Senate confirmation, were chosen to fill *inferior offices* that did not carry the possibility of service as a military judge. If military judges were *principal officers*, the Military Justice Act of 1968 would have authorized the creation and filling of principal offices without any Presidential nomination or Senate confirmation to that principal office, or indeed to any principal office at all. Such a process would preclude the President, the Senate, and the public from playing the parts assigned to them, parts the Framers thought essential to preventing the exercise of arbitrary power and encouraging judicious appointments of principal officers.
>
> The office to which military officers have been appointed [by the President and Senate] since enactment of the 1968 Act includes the potential for service as a military judge. But that would be a

> sufficient response to [an] Appointments Clause objection only if military judges were inferior officers.[1] Otherwise, the method for selecting military judges even from the ranks of post-1968 commissioned officers would reflect an abdication of the political branches' Appointments Clause duties with respect to principal officers.

Weiss, 510 U.S. at 187 (Souter, J., concurring) (emphases added). Likewise, with respect to Senior Judges, the fact that the President and Senate, when appointing Article III Judges, presumably are aware that some will become Senior Judges does not extract Senior Judgeships from the requirements of the Appointments Clause.

Finally, in *Booth v. United States*, 291 U.S. 339 (1934), this Court addressed two questions: "1. Does a [Senior Judge] continue in office within the meaning of section 1 of article III of the Constitution . . . ?," *id.* at 346; and "2. Where the salary of a United States District or Circuit Judge is increased by law after his

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1 Presumably, Justice Souter agreed with the majority that "th[e] principle . . . of 'germaneness' . . . is satisfied here." *Weiss*, 510 U.S. at 174. Otherwise, Justice Souter would appear to have been making the argument that once an officer is appointed to a certain level of office, *i.e.*, principal or inferior, such officer can then be reappointed to any other office of that level outside of the strictures of the Appointments Clause. That would be the equivalent of enabling, outside the stricture of the Appointments Clause, an Associate Justice of this Court to become the Chief Justice, or any Article III Judge to become an Article III Judge on another court on another level.

appointment and he has subsequently retired in full compliance with the provisions of section 260 of the Judicial Code, as amended; is a reduction of [a senior judge's] compensation . . . to an amount [equal or greater to that which] his salary [had been] at the time of his [original] appointment [as an active judge] a diminution of his compensation within the meaning of section 1 of article III of the Constitution?" *Id.* The Court answered both questions in the affirmative. The Court's statement that "[i]t is too late to contend that services so performed were extra-legal and unconstitutional," *id.* at 351, was made only in the context of answering the first question, which, again, was a statutory question, not a Constitutional one; indeed, the opinion contained no discussion of the Constitutional issue.[2]

POINT III

THE ISSUE OF WHETHER ARTICLES II AND III OF THE UNITED STATES CONSTITUTION PERMIT A PANEL OF A COURT OF APPEALS TO INCLUDE A JUDGE OF THE COURT OF INTERNATIONAL TRADE CONCERNS CRUCIAL ISSUES OF SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

The Court of International Trade is a specialized Article III court that, within the federal judicial hierarchy, is analogous to a District Court. *See* 28

2

There is also academic opinion that Senior Judgeships are un-Constitutional. *See, e.g.*, Stras & Scott, *Are Senior Judges Unconstitutional?*, 92 Cornell L. Rev. 453 (2007).

U.S.C. § 1581; American *Air Parcel Forwarding Co. v. United States*, 515 F. Supp. 47, 51 (C.I.T. 1981) ("[28 U.S.C.] Section 1581(i) was apparently drawn from 28 U.S.C. § 1331, the federal question jurisdictional provision with respect to United States district courts. Section 1581(i) may be said to accomplish, as to the Court of International Trade, the purpose served by § 1331 for the district courts.").

For the same reasons that Senior Judgeships violate Articles II and III of the Constitution, *see* Point II, *supra*, so, too, does the placement on a panel of a Court of Appeal, pursuant to 28 U.S.C. § 293(a), of a Judge of the Court of International Trade. In addition, there is an even greater disparity between a Judge of the Court of International Trade and a Circuit Court Judge than there is between a District Judge and a Circuit Court Judge, in that a Judge of the Court of International Trade is not appointed to deal with the full range of substantive matters over which a District Judge is appointed to preside, but is, instead, appointed to a specialized role. *See* 28 U.S.C. § 1581.

POINT IV

THIS COURT SHOULD EXPLAIN THAT THE DECISION OF WHETHER TO CERTIFY, BY A COURT OF APPEALS TO THE HIGHEST COURT OF A STATE, A STATE-LAW QUESTION DOES NOT DEPEND ON THE WORTHINESS OF THE LITIGANTS IN THE ACTION

The Court of Appeals acknowledged that it had "decide[d] a question that is not clearly answered in New York caselaw, but that we [have] decline[d] to

certify" that question, Pet. App. at 17a, pursuant to, first, Rule § 0.27 of the Rules of the Second Circuit, which provides that, "[w]here authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court," and, second, Rule 500.27(a) of the New York Court of Appeals, which provides that, "[w]henever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals."

As this Court has explained, "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997), quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). Because the "use [of certification] in a given case rests in the sound discretion of the federal court," *Lehman Brothers*, 416 U.S. at 391, the standard of review over the exercise of that discretion is the abuse-of-discretion standard. *See GM Corp. v. Devex Corp.*, 461 U.S. 648, 673, n.11 (1983); *NAACP v. New York*, 413 U.S. 345, 365 (1973).

The Court of Appeals, rather than certifying the question of whether CPLR § 205(a) was applicable to Petitioner's District Court action, dismissed that action. *See* Pet. App. at 18a-19a. Thus, the Court of Appeals could not claim that certification would have

disrupted the course of the federal litigation, for the court chose, instead, to end that litigation. Furthermore, additional reasons provided by the Court of Appeals for its decision not to certify the question also show that its decision was an abuse of discretion. First, the Court of Appeals stated that "the state courts have already thrown this case out, revived it, and then thrown it out again. They have expressed their desire to be rid of it (twice) and it would be an imposition on the state's highest court for us to serve it up again." Pet. App. at 18a. However, not only had the New York Court of Appeals never had any involvement with the case, but the notion that certification would be an imposition upon that court is belied by the fact that that court's own rule regarding certification leaves that court's granting of certification to its discretion. *See* Rule 500.27(d) of the New York Court of Appeals.

Second, not only did the first dismissal of Petitioner's state-court action result in the partial reversal, and reinstatement of that action, by an appellate court, *see Doyle v. American Home Products Corp.*, 729 N.Y.S.2d 194 (N.Y. App. 2001), but, more importantly, the Second Circuit Court of Appeals' finding that the two dismissals reflected the state courts' "desire to be rid of it," Pet. App. at 18a, such that "it would be an imposition on the state's highest court for us to serve it up again," *id.*, and that "all the plaintiff has lost is a claim in which he has shown no more than lackadaisical interest," *id.*, entirely ignore the purposes of certification, which concern neither the certifying court's view of a litigant's personal entitlement to certification, nor whether a state's highest court wishes to be 'served up' with a matter (much less a matter in which such court actually had no prior involvement in the litigation). Rather, the

purpose of certification, which is to promote "federal-state comity, constitutional avoidance, judicial efficiency, the desire to settle correctly a recurring issue of state law[,] transcend the interests of individual litigants." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 778, n.6 (2005) (Stevens, J., dissenting).

The failure of the Second Circuit Court of Appeals to apply the correct standards in determining whether to certify the question regarding CPLR § 205(a) is necessarily an abuse of discretion. *See Philippines v. Pimentel*, 128 S. Ct. 2180, 2189 (2008) ("a court by definition abuses its discretion when it makes an error of law") (citation and additional quotation marks omitted).

POINT V

THE ISSUE OF WHETHER A STATUTE MAY BE CONSTRUED BASED UPON ITS PURPOSE RATHER THAN UPON ITS TEXT RAISES THE CRITICAL ISSUE OF THE DUE-PROCESS RIGHT TO KNOW THE LAW

The Court of Appeals stated that "[o]ur conclusion [is] based on statutory purpose." Pet. App. at 17a. *See also id.* at 6a-8a (discussing the "purpose" of CPLR § 205(a)). Other than a quotation of CPLR § 205(a), the opinion of the Court of Appeals contains no discussion of the text of that provision. This complete absence of textual analysis raises the fundamental issue of one's Fifth Amendment right to know the law, *i.e.*, to know his rights and obligations under the law (the Fifth Amendment, rather than the Fourteenth Amendment, is invoked here because the government

actor was a federal court). Once a court looks beyond the text of the statute and that text's common understanding, the court is no longer interpreting law but instead is deciding what the law should be, or might have been, had it been written more clearly, or written differently. This case presents a paradigmatic example in which a court, in reaching beyond the text of a statute, holds, in effect, that one must be more than a reasonably knowledgeable person in order to know the law. CPLR § 205(a) provides that it is inapplicable where a prior action was dismissed "*for* neglect to prosecute" (emphasis added). The common understanding of this phrase clearly refers to dismissals that were issued *because* of, or *on the basis* of, a plaintiff's neglect to prosecute; yet the Court of Appeals completely twisted the statute's meaning in holding that, in light of the statute's *purpose*, a dismissal need not be *for* neglect to prosecute in order for the statute to be inapplicable, but that, instead, a dismissal need merely *follow* such neglect. Indeed, perhaps the statute ought to have provided for its lack of application where a plaintiff, regardless of the *reason* for dismissal of his prior action, had, *in fact*, neglected to prosecute it; however, that is *not* what the statute states, nor is it even ambiguous on this point. Thus, in reaching a "purpose"-based holding that clearly contradicts the plain meaning of the text, the Court of Appeals violated Petitioner's Fifth Amendment due-process right to know the law.

POINT VI

THE ISSUE OF WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT SECTION 205(a) OF THE NEW YORK CIVIL PRACTICE LAW AND RULES PRECLUDED PETITIONER'S DISTRICT COURT ACTION AFFECTS NUMEROUS LITIGANTS

On July 7, 2008, CPLR § 205(a) was amended to add that "[w]here a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation" (referred to at Pet. App. at 10a-11a, n.1). Although this amendment would, if the dismissal of Petitioner's state-court action had occurred after the amendment's effective date, have saved his District Court action, there undoubtedly remain numerous plaintiffs in the same position as plaintiff, who, at least if they bring suit in federal court, would be deprived of what is clearly their right to benefit from CPLR § 205(a) as it existed prior to its amendment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted.

January 19, 2010

Respectfully submitted,

TODD C. BANK
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

Counsel for Petitioner

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

2. 28 U.S.C. § 371

(a) Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.

(b)(1) Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service

requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (e).

(2) In a case in which a justice or judge who retires under paragraph (1) does not meet the requirements of subsection (e), the justice or judge shall continue to receive the salary that he or she was receiving when he or she was last in active service or, if a certification under subsection (e) was made for such justice or judge, when such a certification was last in effect. The salary of such justice or judge shall be adjusted under section 461 of this title.

(c) [omitted]

(d) The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires under this section.

(e)(1) In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs:

(A) The justice or judge must have carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months. In the instance of a justice or judge who has sat on both district courts and courts of

appeals, the caseload of appellate work and trial work shall be determined separately and the results of those determinations added together for purposes of this paragraph.

(B) The justice or judge performed in the preceding calendar year substantial judicial duties not involving courtroom participation under subparagraph (A), including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. Any certification under this subparagraph shall include a statement describing in detail the nature and amount of work and certifying that the work done is equal to or greater than the work described in this subparagraph which an average judge in active service would perform in three months.

(C) The justice or judge has, in the preceding calendar year, performed work described in subparagraphs (A) and (B) in an amount which, when calculated in accordance with such subparagraphs, in the aggregate equals at least 3 months work.

(D) The justice or judge has, in the preceding calendar year, performed substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a Federal or State governmental entity. A certification under this subparagraph shall specify that the work done is equal to the full-time work of an employee of the judicial branch. In any year in which a justice or judge performs work described under this subparagraph for less than the full year, one-half of such work may be aggregated with work described under subparagraph (A), (B), or (C) of this paragraph for the purpose of the

justice or judge satisfying the requirements of such subparagraph.

(E) The justice or judge was unable in the preceding calendar year to perform judicial or administrative work to the extent required by any of subparagraphs (A) through (D) because of a temporary or permanent disability. A certification under this subparagraph shall be made to a justice who certifies in writing his or her disability to the Chief Justice, and to a judge who certifies in writing his or her disability to the chief judge of the circuit in which the judge sits. A justice or judge who is certified under this subparagraph as having a permanent disability shall be deemed to have met the requirements of this subsection for each calendar year thereafter.

(2) Determinations of work performed under subparagraphs (A), (B), (C), and (D) of paragraph (1) shall be made pursuant to rules promulgated by the Judicial Conference of the United States. In promulgating such criteria, the Judicial Conference shall take into account existing standards promulgated by the Conference for allocation of space and staff for senior judges.

(3) If in any year a justice or judge who retires under subsection (b) does not receive a certification under this subsection (except as provided in paragraph (1)(E)), he or she may thereafter receive a certification for that year by satisfying the requirements of subparagraph (A), (B), (C), or (D) of paragraph (1) of this subsection in a subsequent year and attributing a sufficient part of the work performed in such subsequent year to the earlier year so that the work so attributed, when added to the work performed during such earlier year,

satisfies the requirements for certification for that year. However, a justice or judge may not receive credit for the same work for purposes of certification for more than 1 year.

(4) In the case of any justice or judge who retires under subsection (b) during a calendar year, there shall be included in the determination under this subsection of work performed during that calendar year all work performed by that justice or judge (as described in subparagraphs (A), (B), (C), and (D) of paragraph (1)) during that calendar year before such retirement.

3. 28 U.S.C. § 293(a)

The Chief Justice of the United States may designate and assign temporarily any judge of the Court of International Trade to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit in which the need arises.

4. Rule 0.27 of the Local Rules of the United States Court of Appeals for the Second Circuit

Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court. Such certification may be made by this Court sua sponte or on motion of a party filed with the clerk of this Court. Certification will be in accordance with the procedures provided by the state's legislature or highest state

court rules, e.g. Conn. Public Act No. 85-111; New York Court of Appeals Rule 500.[2]7. Certification may stay the proceedings in this Court pending the state court's decision whether to accept the certification and its decision of the certified question.

5. Section 205(a) of the New York Civil Practice Law and Rules

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.*

* Last sentence effective July 7, 2008.

6. Rule 500.27 of the New York Court of Appeals

(a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state that determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists, the court may certify the dispositive questions of law to the Court of Appeals.

(b) The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of facts setting forth the nature of the case and the circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, that may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.

(c) The certificate, certified by the clerk of the certifying court under its official seal, together with the original or a copy of all relevant portions of the record and other papers before the certifying court, as it may direct, shall be filed with the clerk of the Court.

(d) The Court, on its own motion, shall examine the merits presented by the certified question, to determine, first, whether to accept the certification, and second, the review procedure to be followed in determining the merits.

(e) If the certification is accepted, the clerk of the Court shall request any additional papers the Court requires for its review. The clerk of the Court shall notify the

parties of the time periods for filing of briefs, if any, and calendaring of argument, if any, directed by the Court.

(f) [omitted)

(g) [omitted)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION

Docket No. 08-2149-cv

Dated and Entered September 29, 2009

ROBERT DOYLE,

Plaintiff-Appellant,

AMERICAN HOME PRODUCTS CORPORATION and AMERICAN CYANAMID COMPANY,

Defendants-Appellees.

Before: JACOBS, Chief Judge, SACK, Circuit Judge, and GOLDBERG, Judge.*

* The Honorable Richard W. Goldberg, United States Court of International Trade, sitting by designation.

Plaintiff Robert Doyle appeals from a district court order dismissing his case as untimely under the relevant statute of limitations. The district court concluded that a dismissal in state court for failure to appear at a court conference constituted a dismissal "for neglect to prosecute" such that Doyle could not avail himself of a six-month tolling provision under

New York Civil Practice Law and Rules section 205(a). For the foregoing reasons, we affirm the dismissal.

TODD C. BANK, Kew Gardens, New York, for Appellant.

LAUREN J. ELLIOT, (Daniel J. Thomasch, on the brief), Orrick, Herrington & Sutcliffe LLP, New York, New York, for Appellees.

DENNIS JACOBS, Chief Judge:

Robert Doyle's 1996 suit against a pharmaceutical manufacturer alleging injury for a drug he took in 1989 and 1993, was dismissed in 2006 by the New York state court after Doyle and his attorney failed to appear at a scheduling conference. When Doyle later commenced this diversity suit on the same claim, Doyle resisted the drug company's limitations defense on the ground that the New York Civil Practice Law and Rules ("CPLR") section 205(a) tolls the statute of limitations during the pendency of the prior action, and for six months after dismissal, if the prior action was dismissed for a technical reason, but not if the prior action was dismissed for "neglect to prosecute."[1] Doyle now appeals from the order entered by the United States District Court for the Eastern

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1 The statute was amended in July 2008. However, that amendment was not in effect at the time of the state court dismissal (March 2006) or the district court dismissal (April 2008), and "[g]enerally, an amendment will have prospective application only, and will have no retroactive effect unless the language of the statute clearly indicates that it shall receive a contrary interpretation." N.Y. Stat. Law § 52. Section 205(a), as amended, contains no language indicating that it should be applied retroactively; accordingly, we do not apply it to the present dispute.

District of New York (Korman, J.) on April 1, 2008, which dismissed his federal action pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the ground that the statute of limitations--long exceeded--had not been tolled. Doyle v. Am. Home Prods. Corp., No. 06 Civ. 5392 (ERK), 2008 U.S. Dist. LEXIS 110122 (E.D.N.Y. Mar. 31, 2008). The question on appeal is whether the dismissal in state court constituted a dismissal "for neglect to prosecute."

I

The State Court Litigation. Doyle commenced this personal injury action in New York State Supreme Court, Kings County, in May 1996, alleging injuries arising from his 1989 and 1993 ingestion of "Minocin," a drug manufactured and sold by Defendants, American Home Products Corporation, now known as Wyeth Holdings Corporation, and its subsidiary, American Cyanamid Company ("Defendants"). The suit asserted claims for negligence, warranty, strict products liability, and misrepresentation.

Defendants' motion for summary judgment was granted in March 2000, and re-argument was denied. In April 2000, Doyle appealed, and in August 2001, the Appellate Division (Second Department) affirmed the dismissal of all claims other than breach of warranty.

On return to the trial court, the parties moved to compel discovery. In August 2002, Doyle was ordered within 60 days to (1) provide authorizations for the release of all medical records, and (2) respond to discovery requests that had been served five months earlier (in March 2002). More than three months later, Doyle had provided neither the authorizations nor the

responses. A phone call to Doyle's attorney elicited a promise to provide the materials within two weeks. According to Defendants, neither Doyle nor his counsel provided the materials. In Doyle's affidavit, he insists that he served the authorizations upon Defendants and that the issue was in dispute because Defendants mistakenly believed that they had not received all of the authorizations requested. Doyle does not explain or excuse his failure to submit the discovery requests.

For the next two years, Doyle admits he did nothing to litigate the action. In October 2005, Defendants served Doyle's attorney with a demand for resumption of prosecution. Doyle's attorney indicated that his client intended to resume litigation and requested that Defendants respond to interrogatories submitted by Doyle approximately four years earlier. In January 2006, Defendants reminded Doyle by letter that: (1) they had responded to the interrogatories three and one-half years earlier (in May 2002); and (2) Doyle was out of compliance with the August 2002 order requiring authorizations and responses within 60 days.

On March 2, 2006, approximately two months after the Defendants' letter, the court scheduled a status conference for March 21, 2006. Neither Doyle nor his counsel appeared at the conference.

The Dismissal. Section 202.27 of New York's Uniform Civil Rules for the Supreme Court and the County Court ("§ 202.27") confers authority on the court to dismiss a cause of action because of the failure of a party to appear at any court conference. 22 NYCRR § 202.27(b). On the day that Doyle and his attorney failed to appear, Justice Diana A. Johnson

signed an order stating in its entirety:

> Dismissed for failure to appear at March 21, 2006 Court Ordered Status Conference.

The order was entered on April 3, 2006, and notice of entry of the order was served on Doyle's attorney on April 13, 2006.

The Federal Court Action. Doyle filed no motion to vacate the default, and filed no appeal from the dismissal. Instead, on September 19, 2006 (approximately five months after the dismissal), Doyle commenced the current action pro se in the Eastern District of New York, alleging diversity jurisdiction and pleading all four claims from the initial state court complaint.[2]

After some procedural maneuvering and at least one conference, Defendants moved on February 16, 2007 for judgment on the pleadings or (in the alternative) for summary judgment. Among other things, Defendants argued that Doyle's action was untimely and could not be saved by the tolling provision of CPLR 205(a), which affords no tolling when actions are dismissed "for neglect to prosecute." N.Y. CPLR 205(a). Doyle conceded that dismissal was appropriate for all claims except the breach of warranty claim (which was the only viable claim in state court by the time that action was dismissed). As to that remaining claim, Doyle invoked section 205(a), the relevant version of which provides:

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2 Doyle is now represented by counsel.

> If an action is timely commenced and is terminated in any other manner than by [1] a voluntary discontinuance, [2] a failure to obtain personal jurisdiction over the defendant, [3] a dismissal of the complaint for neglect to prosecute the action, or [4] a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination . . . .

N.Y. CPLR 205(a).

By Memorandum and Order dated March 31, 2008, the district court granted Defendants' motion and dismissed the action in its entirety, concluding that Doyle's laxness precluded him from the benefit of "the six-month time extension ordinarily awarded to a non-merits dismissal by CPLR 205(a)." (quotations omitted). By order dated July 16, 2008, the district court declined to reconsider its order and reaffirmed its conclusion:

> [T]he immediate and precipitating cause of the dismissal . . . was the culmination of a course of conduct that plainly demonstrated a neglect to prosecute. Even though the order did not specifically allude to the plaintiff's dilatory tactics that spanned years, [the dismissal] should be treated as one for neglect to prosecute.

Doyle v. Am. Home Prods. Corp., No. 06 Civ. 5392 (ERK), at 5, 2008 U.S. Dist. LEXIS 110122 (E.D.N.Y.

Mar. 31, 2008). Doyle now appeals from that conclusion.

II

We review a dismissal under Rule 12(c) de novo. Morris v. Schroder Capital Mgmt. Int'l, 445 F.3d 525, 529 (2d Cir. 2006).

Doyle argues on appeal that his failure to appear for a single court conference does not, in the circumstances presented here, constitute "neglect to prosecute" within the meaning of 205(a); accordingly, a dismissal under section 202.27(b) does not preclude the application of section 205(a)'s six-month tolling period. According to Doyle, it does not matter that a state court could have dismissed an action for failure to prosecute unless the state court actually did so, and made findings to support that conclusion.

In response, Defendants argue that a dismissal for failure to appear can constitute a dismissal "for neglect to prosecute" when the record supports such a reading. Defendants argue that section 202.27 is simply a procedural tool available to effect such a dismissal.

III

The relevant version of section 205(a) provides that "[i]f an action is timely commenced and is terminated in any other manner than by . . . a dismissal of the complaint for neglect to prosecute the action . . . the plaintiff . . . may commence a new action . . . within six

months after the termination . . . ." N.Y. CPLR 205(a). Case law exploring the purpose of 205(a) is well-developed and long-settled: the roots of 205(a) can be traced "to seventeenth century England," and "the remedial concept embodied in CPLR 205(a) has existed in New York law since at least 1788." Reliance Ins. Co. v. Polyvision Corp., 9 N.Y.3d 52, 56, 876 N.E.2d 898, 899, 845 N.Y.S.2d 212 (N.Y. 2007).

"The obvious purpose of CPLR § 205(a) . . . is to prevent the general statute of limitations from barring recovery because a court has ordered a timely action to be terminated for some technical defect that can be remedied in a new one." Graziano v. Pennell, 371 F.2d 761, 763 (2d Cir. 1967). The statute is "said to be an outgrowth of the ancient common law rule of 'journey's account,' a period allowed to permit a party, whose action had abated for matter of form, a reasonable time within which to journey to court to sue out a new writ." Id. (quotations omitted). However, in order to receive the benefit of 205(a) tolling, the litigant must have prosecuted his original claim diligently. Judge Cardozo described 205(a)'s precursor statute: "The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits." Gaines v. City of New York, 215 N.Y. 533, 539, 109 N.E. 594, 596 (N.Y. 1915) (emphasis added). The New York courts have affirmed this point again and again: "[t]he very function of [CPLR 205(a)] is to provide a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim." George v. Mount Sinai Hosp., 47 N.Y.2d 170, 178-79, 390 N.E.2d 1156, 1161, 417 N.Y.S.2d 231 (N.Y. 1979); see also Morris Investors,

Inc. v. Comm'r of Fin. of City of New York, 503 N.Y.S.2d 363, 366, 121 A.D.2d 221, 225 (1st Dep't 1986) (quoting George v. Mount Sinai Hosp.), aff'd, 69 N.Y.2d 933, 509 N.E.2d 329, 516 N.Y.S.2d 635 (N.Y. 1987); Graziano, 371 F.2d at 763 (quoting Judge Cardozo in Gaines v. City of New York); Producers Releasing Corp. v. Pathe Indus., 184 F.2d 1021, 1023 (2d Cir. 1950) (same). In short, the purpose of 205(a) is to save cases otherwise dismissed on curable technicalities--but only when the litigant has diligently prosecuted the claim.

Here, the district court's dismissal was proper because the record plainly reflects that Doyle failed to diligently prosecute his claim. Doyle initially filed suit in state court in 1996, failed to submit to discovery, and admittedly failed to take any action in the case for a two-year period. After prompting by the Defendants, he sought to revive the action, only to fail to appear for a conference shortly thereafter. Under these circumstances, we have no trouble concluding that the dismissal for failure to appear amounted to a dismissal "for neglect to prosecute" barring application of 205(a) tolling. See, e.g., Villanova v. King Kullen Supermarkets, 558 N.Y.S.2d 55, 56, 163 A.D.2d 203, 203 (1st Dep't 1990).

IV

Our conclusion, based on statutory purpose, decides a question that is not clearly answered in New York caselaw, but that we decline to certify. The parties cite cases on whether 205(a) tolling is available absent an express finding on neglect to prosecute.

Compare Burns v. Pace Univ., 809 N.Y.S.2d 3, 4, 25 A.D.3d 334, 335 (1st Dep't 2006) ("we find that plaintiff was entitled to rely on the tolling provision in CPLR 205 (a) since the action was not dismissed for neglect to prosecute, even though there was sufficient evidence in the record to support such a dismissal"), with Andrea v. Arnone, 5 N.Y.3d 514, 520, 840 N.E.2d 565, 567, 806 N.Y.S.2d 453 (N.Y. 2005) ("Our decisions make clear that the 'neglect to prosecute' exception in CPLR 205 (a) applies not only where the dismissal of the prior action is for '[w]ant of prosecution' . . . but whenever neglect to prosecute is in fact the basis for dismissal . . . ."), and Flans v. Fed. Ins. Co., 43 N.Y.2d 881, 882, 374 N.E.2d 365, 365, 403 N.Y.S.2d 466 (N.Y. 1978) (concluding "inferentially" from the record before it that the "dismissal of the original, timely action was . . . for 'neglect to prosecute'"). These cases are distinguishable from the facts before us on one ground or another: for example, Justice Johnson's order does not say whether "neglect to prosecute is in fact the basis for dismissal." Even so, we might ordinarily certify the question to the New York Court of Appeals. There are good reasons why we do not do so. First, the state courts have already thrown this case out, revived it, and then thrown it out again. They have expressed their desire to be rid of it (twice) and it would be an imposition on the state's highest court for us to serve it up again. Second, New York has well-developed case law on the purpose and application of CPLR 205(a) and its precursor statutes; that case law is unambiguous and provides more than ample foundation for our ruling. Third, certification is not necessary where precedent is clear and application of law to fact requires no grand or novel pronouncements of New York law. See, e.g., Regatos v. N. Fork Bank, 5 N.Y.3d 395, 400, 838 N.E.2d 629, 631, 804 N.Y.S.2d 713 (N.Y.

2005) (accepting certification when disposition of the case involved "novel, important questions of New York law"). Finally, all the plaintiff has lost is a claim in which he has shown no more than lackadaisical interest.

CONCLUSION

For the following reasons, the judgment and order of the district court is affirmed and the case dismissed.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MEMORANDUM AND ORDER

NOT FOR PUBLICATION

Dated and Entered March 31, 2008

ROBERT DOYLE,

Plaintiff,

-against-

AMERICAN HOME PRODUCTS CORPORATION and AMERICAN CYANAMID COMPANY,

Defendants.

KORMAN, J.

I assume familiarity with the underlying facts of this case, in which the defendants have moved for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) or, in the alternative, for summary judgment. The plaintiff concedes that the defendants are entitled to the relief that they seek with respect to all but one of the causes of action alleged in the complaint. Thus, the only cause of action at issue is the one for breach of warranty in connection with his 1993 course of Minocin. The viability of this cause of action depends

on whether it is barred by the statute of limitations.

Briefly, the complaint, which was originally filed in the Supreme Court of the State of New York, Kings County, was dismissed after plaintiff failed to appear for a status conference on March 21, 2006. The order, dismissing the case for that reason, was entered on March 28, 2006. The plaintiff did not take any affirmative steps to remedy the dismissal, such as file a motion to vacate the default or to restore the case, nor did he file an appeal from the dismissal. *See, e.g., Perez v. New York City Hous. Auth.*, 290 A.D.2d 265, 736 N.Y.S.2d 29 (1st Dep't 2002); *Levy v. New York City Hous. Auth.*, 287 A.D.2d 281, 731 N.Y.S.2d 20 (1st Dep't 2001). Instead, the plaintiff, an attorney appearing *pro se*, commenced an action here that was identical to the one which had been dismissed.

The defendants seek the dismissal of this cause of action on the ground that it is barred by the statute of limitations. The parties agree that the complaint here was filed outside of the statute of limitations. The only issue is whether it comes within the savings clause of New York CPLR § 205(a), which provides, in relevant part, as follows:

> If an action is timely commenced and is terminated in any *other manner than . . . a dismissal of the complaint for neglect to prosecute the action*, . . . the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of

commencement of the prior action. . . .

McKinney's CPLR § 205(a) (emphasis added). The defendants argue that the plaintiff cannot avail himself of § 205(a) because the dismissal for failure to appear comes within the category a dismissal "for neglect to prosecute the action." I agree.

Section 202.27 of the Uniform Civil Rules for the Supreme Court and the County Court confers the authority to dismiss a cause of action because of the failure of a party to appear at any conference. *See Saunders v. Riverbay Corp.*, 17 A.D.3d 137, 138, 791 N.Y.S.2d 828 (1st Dep't 2005) (complaint of plaintiff who did not appear at a status conference was properly dismissed pursuant to 22 NYCRR 202.27(b) notwithstanding the fact that the dismissing court never referred to that provision as the basis of dismissal). Together with Rule 3404 and Rule 3216 of the CPLR, 22 NYCRR 202.27 is categorized as a "laxness provision," and "[a] dismissal under any one of these provisions usually qualifies as a laxness dismissal, which means that if the statute of limitations has expired, the claim is dead: it doesn't get the six-month time extension ordinarily awarded to a non-merits dismissal by CPLR 205(a)." David D. Siegel, 180 Siegel's Prac. Rev. 3. Nevertheless, as previously noted, a party whose case has been dismissed on account of laxness is not without recourse. See id. As the Appellate Division has observed:

> In many cases, dismissal pursuant to § 202.27 occurs after the statute of limitations has expired, precluding the plaintiff from commencing a new action.

> In such cases, the plaintiff's sole remedy is to seek to vacate the default and make a sufficient evidentiary showing to establish a reasonable excuse for the failure to appear and a meritorious cause of action.

Espinoza v. Concordia Intern. Forwarding Corp., 32 A.D. 3d 326, 327, 820 N.Y.S.2d 259 (1st Dep't 2006). In the forgoing case, the second complaint was filed within the period of the statute of limitations. Consequently, the Appellate Division held that the plaintiff could file the second complaint even though he did not move to vacate the default. The complaint here was filed outside of the period of the statute of limitations. Morever, the record does not provide any basis to conclude "that the dismissal of the original suit was not intended by the Justice presiding to be a dismissal for neglect to proceed." *Schuman v. Hertz Corp.*, 17 N.Y.2d 604, 605, 215 N.E.2d 683, 268 N.Y.S.2d 563 (1966). Under these circumstances, plaintiff's cause of action for breach of warranty must be dismissed along with the rest of the complaint.

CONCLUSION

The motion to dismiss the complaint is granted.

SO ORDERED:

Brooklyn, New York
March 31, 2008

/s/ Edward R. Korman
Edward R. Korman
Senior United States District Judge

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

ORDER

At an I.A.S. Trial Term, Part [sic] of the Supreme Court of the State of New York, held in the County of Kings, at the Courthouse, located at Civil Center, Borough of Brooklyn, 360 Adams Street, Brooklyn, City and State of New York, on the 21st day of March, 2006

Present: Hon. Diana Johnson
Index No. 18221/96

ROBERT DOYLE,

Plaintiff,

-against-

AMERICAN HOME PRODUCTS CORPORATION, AMERICAN CYANAMID COMPANY,

Defendants.

Dismissed for failure to appear at March 21, 2006 Court Ordered Status Conference.

ENTER

/s/ Diana Johnson
J.S.C.